IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

WEDNESDAY, THE 5TH DECEMBER 2007 / 14TH AGRAHAYANA 1929

SA.No. 197 of 2000(F)

AGAINST THE JUDGMENT AND DECREE DATED 15.12.1998 IN AS.807/1994 OF SUB COURT,NEYYATTINKARA .
OS.NO.208/1986 OF THE PRINCIPAL MUNSIFF'S COURT, NEYYATTINKARA

APPELLANTS: RESPONDENTS 1 AND 2: PLAINTIFFS:

1. RAGHAVAN VISWAMBARAN, AGED 52,
VALIYAVILA THEKKEVILA VEEDU,
THIRUMALA FROM PANAMVILAKATHU VEEDU,
VATTIYOORKAVU, ARAMADAMURI,
ARAMADA VILLAGE, TRIVANDRUM.

2. ARUNTHATHI VASANTHAKUMARI, AGED 40, OF -DO- -DO-

BY ADV. SRI.G.S.REGHUNATH

RESPONDENTS: APPELLANTS & 3RD RESPONDENT: DEFENDANTS:

1. NEELAKANTAN MADHAVAN, AGED 58, HOUSE NO.3/101,
PATTARIAR NEDUMTHERUVU, EDALAKKUDI VILLAGE,
KANYAKUMARI DISTRICT, HAVING ALSO
ELAVUNINNA MELE PUTHEN VEEDU, KAZHUVOOR DESOM,
KANJIRAMKULAM VILLAGE, NEYYATTINKARA.

2. BHAGAVATHY OMAN, AGED 54 OF -DO- -DO-

3. MUTHAN NADAR SOLAMAN, AGED 50, ELAVUNINNA PURAYIDOM,
KAZHUVOOR DESOM, KANJIRAMKULAM VILLAGE,
NEYYATTINKARA TALUK.

R1 & R2 BY ADV. SRI.R.S.KALKURA

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 05/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.M.P.NOS.531/2001, 2400/2000 AND I.A.NO.1837/2007

DISMISSED

5/12/2007 SD/- K.T.SANKARAN, JUDGE

//TRUE COPY//

AHZ/

K.T.SANKARAN, J.

S.A.. NO. 197 OF 2000

Dated this the 5th day of December, 2007

JUDGMENT

On 19.11.2007 an order was passed for posting the Second Appeal for hearing on the question as to whether the first appeal before the lower appellate court had abated. Learned counsel appearing for both parties submitted that this question is not very relevant. The suit was filed for declaration of title and for injunction. There were three defendants in the suit. The first defendant, Muthan Nadar Solaman, was exparte in the trial court. The suit was contested by defendants 2 and 3. The trial court decreed the suit. Defendants 2 and 3 filed an appeal before the lower appellate court. The first defendant was the third respondent in the appeal. He died during pendency of the appeal. Since the third respondent in the appeal was exparte in the trial court and since he would be a party benefited in case the appeal was allowed, I do not think that the question of abatement need be considered as a preliminary point, as agreed by both the counsel.

2. The appellants are the plaintiffs in O.S.No.208 of 1986, on the file of the Court of the Principal Munsiff of Neyyattinkara. The suit was filed for declaration of title and possession of the plaint schedule property and for permanent prohibitory injunction restraining the defendants from

trespassing into the plaint schedule property or taking yield from the property or from cutting and removing trees or committing waste. Defendants 2 and 3 contested the suit. The trial court held that the plaintiffs have established their title and possession over the plaint schedule property and the suit was decreed.

3. Defendants 2 and 3 filed A.S.No.807 of 1994, on the file of the Court of the Subordinate Judge of Neyyattinkara, challenging the judgment and decree of the trial court. The Appellate Court allowed the appeal, set aside the judgment and decree of the trial court and dismissed the suit.

4. When the Second Appeal was taken up for hearing, learned counsel for the respondents/defendants 2 and 3 submitted that though they succeeded in the appeal before the Appellate Court, the Appellate Court did not consider several documents produced by them as additional documents. He submitted that for a proper adjudication of the disputes involved in the case effectively and finally, it is necessary to consider those documents as well. Learned counsel for the respondents also submitted that this Court may accept those documents as additional evidence and consider the same while disposing of the Second Appeal. Learned counsel for the appellants submitted that it may not be proper for

the second appellate court to consider those documents for the first time and if the Court feels that those documents are also to be looked into, parties must have an opportunity to adduce evidence. Learned counsel for the respondents also submitted that evidence may be required in the case.

5. It is submitted by the learned counsel appearing for both parties that the lower appellate court has not considered the applications filed by the respondents herein for receiving additional documents at the appellate stage and no orders were passed on the merits in those applications.

6. Instead of considering the questions of law raised in the Second Appeal, I propose to dispose of the Second Appeal on the following question of law:

> "Was the lower appellate court justified in not passing any order in the applications filed by the respondents in the Second Appeal (appellants in the first appeal) to receive additional evidence under Rule 27 of Order XLI of the Code of Civil Procedure and whether this has vitiated the judgment?"

7. It is submitted by the counsel for the appellants that if the questions of law raised in the Second Appeal are considered and decided after taking note of the additional documents produced by the

respondents as well, much prejudice would be caused to the appellants, since the appellants would be denied of an opportunity to adduce evidence and to cross examine the witnesses touching upon the additional documents.

8. When an application is filed before the appellate court under Order XLI Rule 27 of the Code of Civil Procedure, the appellate court is bound to consider and dispose of the same. If the Court finds that the party producing the additional documents was prevented for sufficient cause in not producing those documents before the trial court or that notwithstanding the exercise of due diligence such evidence was not within his knowledge and, therefore, he could not produce the same or if the appellate court finds that such documents are necessary for the effectual and complete adjudication of the dispute, the documents may be received in evidence. The court has to consider the application on the merits and decide whether the discretion is to be exercised to receive the documents as additional documents in the facts and circumstances of the case. In the peculiar facts of this case, as pointed out by the counsel on both sides, it was absolutely necessary for the appellate court to have considered the question whether the additional documents could be accepted in evidence or not. Having not done so, I am of the view that there was no effective and complete disposal of the appeal on the merits.

For the aforesaid reasons, the judgment and decree passed by the lower appellate court, are hereby set aside. The lower appellate court shall dispose of the appeal afresh after passing an order in the applications filed by the appellants before the lower appellate court (A.S.No.807 of 1994) to receive additional documents. If the court below finds that the documents are liable to be accepted as additional evidence, the appellate court would be free to allow the parties to adduce such other evidence as is relevant. The lower appellate court shall dispose of the appeal on the merits as expeditiously as possible. Pending disposal of the appeal, both parties are restrained from cutting and removing trees and committing any waste in the plaint schedule property, in view of the applications filed by them in this Second Appeal for such relief against each other.

(K.T.SANKARAN)
Judge

ahz/

K.T.SANKARAN, J.

S.A.NO. 197 OF 2000

JUDGMENT

5th December, 2007